

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JONES,

Defendant-Appellant.

UNPUBLISHED
October 17, 2000

No. 212117
Wayne Circuit Court
LC No. 97-008090

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was thereafter sentenced to five years' probation. He appeals as of right and we affirm.

Defendant first argues that the evidence was insufficient to support his conviction. When determining whether sufficient evidence has been presented to sustain a conviction, this Court reviews all the evidence in a light most favorable to the prosecution and decides whether a rational trier of fact could have found that all the elements of the charged offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

The elements of second-degree criminal sexual conduct are that the defendant engages in sexual contact with another person and that other person is under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); *People v Lemons*, 454 Mich 234, 252; 562 NW2d 447 (1997). Here, defendant argues only that sexual contact did not occur.

The victim testified that defendant rubbed the victim's penis over his clothes and that, on another occasion, defendant rubbed the victim's penis until he ejaculated. The trial court found this testimony to be credible stating, "I'm totally convinced there was sexual touching." From this evidence, the trial court could have found that the essential elements of second-degree criminal sexual conduct were proven beyond a reasonable doubt, including sexual contact. Any issues of witness credibility were for the fact finder, here the trial court, to resolve and we are required to draw all reasonable inferences and make credibility choices in support of the verdict. *People v Nowack*, 462 Mich 392, 400; ___ NW2d

___ (2000). Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to convict defendant of second-degree criminal sexual conduct.

Defendant also argues that the verdict was against the great weight of the evidence. A new trial based on the great weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would result if a new trial were not granted. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Id.*, p 647.

As discussed above, the trial court found the victim’s testimony, that defendant rubbed his penis on two occasions, to be credible. Although the victim’s testimony regarding anal sex was contradicted by physical evidence (i.e., the stipulation that, due to defendant’s medical condition, anal sex would be very painful), the victim’s testimony regarding this sexual contact was not contradicted by physical evidence. Also, the trial court found the victim’s testimony to be credible despite the contradictions in his testimony regarding dates. Defendant argues that the victim’s testimony was not credible. However, it is the province of the fact finder to determine questions of fact and assess credibility of witnesses. *Id.*, p 637. Further, the evidence does not preponderate heavily against the verdict, where the victim testified that defendant had sexual contact with him and the trier of fact found this testimony to be credible. A serious miscarriage of justice would not occur here if a new trial is not granted. *Id.*, p 642.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra